No. 78-1288

In the Supreme Court of the United States

OCTOBER TERM, 1978

JESSE HIGGINS, ET AL., PETITIONERS

v.

RAY MARSHALL, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

WILLIAM KANTER
FREDDI LIPSTEIN
Attorneys
Department of Justice
Washington, D.C. 20530

CARIN ANN CLAUSS
Solicitor of Labor

CORNELIUS S. DONOGHUE, JR.
Acting Associate Solicitor

JUDITH E. WOLF
Co-Counsel for Black Lung Benefits

JOHN S. LOPATTO III
Attorney
Department of Labor
Washington, D.C. 20210

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 584 F. 2d 1035. The order of the district court (Pet. App. 15a) is unreported. The opinion of the administrative law judge (Pet. App. 16a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1978, and a timely petition for rehearing was denied on September 22, 1978 (Pet. App. 13a). On December 15, 1978, the Chief Justice extended the time for filing a petition for a writ of certiorari until February 19, 1979 (a holiday), and the petition was filed on February 20, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 203(b)(3) of the Federal Coal Mine Safety and Health Act requires that a coal miner who transfers to a less dusty work place indefinitely receive wage increases applicable to his former position.

STATEMENT

1. Petitioners are three Illinois coal miners who developed signs of pneumoconiosis in 1972. Each of them exercised his right under Section 203 of the Federal Coal Mine Safety and Health Act, 30 U.S.C. 843, to transfer from his current work place to a less dusty work place in order to arrest further development of the disease. The jobs that petitioners left paid $41.50 per day, while the jobs to which they transferred paid $37.25 per day. Yet because of the pay protection provision in Section 203(b)(3) of the Act, 30 U.S.C. 843(b)(3), petitioners were paid $41.50 per day in their new jobs—the same rate they had been paid in their previous jobs. Section 203(b)(3) provides that any miner transferred under Section 203 "shall receive compensation at not less than the regular rate of pay received by him immediately prior to his transfer."

Under a new wage agreement, the pay in petitioners' former jobs was subsequently increased to $45.75 daily, and the pay in their new jobs was increased to $40.00 per day. Petitioners continued to receive their old wage of $41.50 per day at that time. The following year, the wage rate for their old jobs increased to $50.00 per day, while the rate for their new positions increased to $42.75 per day. At that point, petitioners received an increase to $42.75. Since then petitioners have continued to receive the annual increases applicable to their new positions.

2. Petitioners filed an administrative complaint contending that the statute required that they be compensated indefinitely at the rate of pay applicable to their previous

positions. They alleged that their employer was discriminating against them in violation of 30 U.S.C. 938 by failing to pay them the increases applicable to their previous positions.

An administrative law judge held that Section 203(b)(3) requires that miners who transfer to less dusty jobs continue to receive the daily or hourly rate of pay they received "immediately prior" to their transfer, but that the statute does not entitle them indefinitely to receive all increases paid to employees in their old positions. The district court agreed with this position (Pet. App. 15a), and a divided panel of the court of appeals affirmed. It held that "the language of [the statute] is simple and straight-forward: a transferring miner is not to receive less compensation than he would have received had he not transferred, that is, not less than the monetary amount he was receiving 'immediately prior to transfer' " (Pet. App. A, majority op. 6). The court found the legislative history and the purposes of the Act to be consistent with its interpretation of the statutory language (*id.* at 7-10).

ARGUMENT

The decision below is correct; it is consistent with the interpretation of the statute taken by the Secretary of Labor, and it is not in conflict with any decision of this Court or any other court of appeals.

1. Section 203(b)(3) provides that a transferring miner must receive at least the regular daily or hourly rate of pay he received "immediately prior" to his transfer. The Act does not provide that a transferring miner must forever be paid at the rate applicable to his job if that rate increases; such increases, after all, are no part of the pay he received "immediately prior" to the transfer. The purpose of the pay protection statute is simply to ensure that a miner who transfers to protect his health will not suffer an immediate pay cut or loss of income as a result

of the transfer. Thus, a transferring miner may never receive less than the rate of pay he received in his prior position, although he may receive more. To provide that former miners should continue to receive additional compensation indefinitely, long after they have left the more hazardous work place, would impose substantial burdens on mine owners over extended periods of time.

Although the legislative history in 1969 of the original provision is sparse, the legislative history of the 1977 amendments to the Act confirms this reading and indicates how Congress intended the pay protection provision to operate. The House version of the proposed amendment to Title I included no pay protection provision,[1] while the Senate version provided that:

> Any miner transferred as a result of such exposure [to a hazard covered by a mandatory standard promulgated under this Act] shall continue to receive compensation for such work at not less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer.

S. 717, 96th Cong., 1st Sess. § 201 (1977). As subsequently enacted, however, the provision, Section 101(a)(7) (to be codified at 30 U.S.C. 811(a)(7)),[2] limits the pay protection so that the miner suffers no immediate loss of compensation, but any subsequent increases in his rate of pay stem from the rate for the new position:

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[1]Title I of the Act concerns mandatory safety and health standards and is applicable to all mining operations. Title II, of which Section 203(b)(3) is a part, applies only to coal mines and concerns interim mandatory health standards. Under Title I, as amended, a miner's transfer is mandatory if a particular condition is determined to be hazardous. Under Title II, the miner has the option to transfer to a less dusty work area if he is determined to have pneumoconiosis.

[2]The conference report explaining the provision explicitly states that it is more limited than the Senate version and is meant to entitle the miner only to the dollar rate increases of his new job. H. R. Conf. Rep. No. 95-655, 95th Cong., 1st Sess. 42 (1977).

> Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer. In the event of the transfer of a miner pursuant to the preceding sentence, increases in wages of the transferred miner shall be based upon the new work classification.

When Congress was considering these amendments, the President of the United Mine Workers of America proposed an amendment to Section 203(b)(3) that would have had the effect of ensuring that transferring miners would receive increases based on their old classifications, but the proposed change was not adopted. See Pet. App. A, majority op. 8 n.4. Because the administrative interpretation of the statute was specifically brought to Congress' attention, and Congress nevertheless left the challenged provision unchanged, it is fair to conclude that Congress has acquiesced in, if not ratified, the administrative interpretation. See *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975); *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 366 (1951); *National Lead Co.* v. *United States*, 252 U.S. 140, 146 (1920).

2. Contrary to petitioners' assertion (Pet. 13-15), the decision in this case is not in conflict with the decision of any other court of appeals. The decision in *Collins* v. *Mathews*, 547 F. 2d 795 (4th Cir. 1976), which petitioners claim conflicts with the decision in this case, had nothing to do with the pay protection provision. *Collins* involved the question whether a miner was totally disabled because of pneumoconiosis. A miner is totally disabled within the meaning of 30 U.S.C. 902(f) when pneumoconiosis "prevents him from engaging in gainful employment * * * in a mine or mines in which he previously engaged with some regularity and over a substantial period of time." The court

in *Collins* observed that the fact that yearly earnings of a black lung claimant remained constant during a period when most miners' wages increased could reflect an inability to work "with some regularity." 547 F. 2d at 799. The discussion of "wages" and "real wage rate" in *Collins* thus has no bearing on the pay protection provision in Section 203.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

WILLIAM KANTER
FREDDI LIPSTEIN
Attorneys

CARIN ANN CLAUSS
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Acting Associate Solicitor

JUDITH E. WOLF
Co-Counsel for Black Lung Benefits

JOHN S. LOPATTO III
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Department of Labor

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